### STATE OF MICHIGAN

### IN THE SUPREME COURT

# (On Appeal from the Michigan Court of Appeals and **Circuit Court for the County of Livingston)**

MATTHEW BARRETT,

(K

Plaintiff-Appellee,

-VS-

MT. BRIGHTON INCORPORATED, a Michigan corporation,

Defendant-Appellant.

=SULLIVAN, WARD, ASHER & PATTON, P.C. =

## **NOTICE OF HEARING**

# **APPLICATION FOR LEAVE TO APPEAL ON BEHALF** OF DEFENDANT-APPELLANT MT. BRIGHTON, INC.

# PROOF OF SERVICE

RONALD S. LEDERMAN (P38199) SCOTT D. FERINGA (P28977) Attorneys for Defendant-Appellant Mt. Brighton 1000 Maccabees Center 25800 Northwestern Highway P. O. Box 222 Southfield, MI 48037-0222 (248) 746-0700

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# TABLE OF CONTENTS

IND	DEX OF AUTHORITIES	11
	ATEMENT OF ORDER APPEALED FROM AND OF NEED FOR APPELLATE VIEW PRIOR TO ENTRY OF FINAL JUDGMENT	. vi
STA	ATEMENT OF ISSUE PRESENTED	. ix
STA	ATEMENT OF FACTS	1
Fact	ual Background	1
Low	ver Court Proceedings	2
Initi	al and First Remanded Appellate Proceedings	3
ARG	GUMENT I	7
TO I	A MATTER OF LAW, A SNOWBOARD RAIL UTILIZED BY SNOWBOARD SKIER PERFORM ACROBATIC MANEUVERS IS AN INHERENT, NECESSARY AND VIOUS DANGER OF THE SPORT ASSUMED BY ALL SKIERS UTILIZING DWBOARD TERRAINS UNDER § 22(2) OF THE SKI AREA SAFETY ACT	
A.	Standard of Review	7
B.	Controlling Principles of Statutory Construction.	9
C.	Introduction to the Ski Area Safety Act.	10
D.	Anderson v Pine Knob.	14
E.	Background to Snowboard Skiing	16
F. Cou	An Alpine Skier Assumes All Risks Inherent in All Types of Skiing Present Upon the rse He or She is On.	18
ARC	GUMENT II	22
WA	FENDANT DID NOT VIOLATE MCL 408.326(a) BY POSTING INADEQUATE RNINGS OF THE DIFFICULTY OF SKI SLOPE ON WHICH PLAINTIFF WAS URED.	22
A.	Introduction to Argument	22
001	ICTLICION	~ 4

# **INDEX OF AUTHORITIES**

# **CASES**

== SULLIVAN, WARD, ASHER & PATTON, P.C. =

<u>Anderson</u> v <u>Pine Knob</u> , 469 Mich 20; 664 NW2d 756 (2003)
Andrews v Hastings Mutual Ins Co, 40 Mich App 664 (1970)
Barr v Mt Brighton, Inc, 215 Mich App 512, 516; 546 NW2d 273 (1995)
Cardinal Mooney High School v Michigan High School Athletic Assoc., 437 Mich 75, 80; 467 NW2d 21 (1991)
<u>Coleman</u> v <u>Gurwin</u> , 443 Mich 59, 65; 503 NW2d 435 (1993)
Continental Casualty Co v Enco Associates, Inc. 66 Mich App 46
Duncan v Michigan Mutual Liability Co, 67 Mich App 386 (1976)
Dzierwa v Michigan Oil Co, 152 Mich App 281 (1986)
<u>General Motors Corp.</u> v <u>City of Detroit</u> , 372 Mich 234, (1964), cert den 377 US 977; 12 L Ed 2d 746
Goldman v Lubella Extendables, 91 Mich App 212 (1979), lv den 407 Mich 901 (1979)
<u>Grieb</u> v <u>Alpine Valley Ski Area, Inc,</u> 155 Mich App 484; 400 NW2d 653 (1986)
<u>Kent v Alpine Valley,</u> 240 Mich App 731, 737-738; 613 NW2d 383 (2000)
<u>Maiden v Rozwood,</u> 461 Mich 109 (1999)
<u>Malcolm</u> v <u>City of East Detroit</u> , 437 Mich 132, 143; 468 NW2d 479 (1991)
<u>Marcelle v Taubman,</u> 224 Mich App 215, 217; 568 NW2d 393 (1997)

	<u>Mastro</u> v <u>Petrick</u> , 112 Cal. Rptr. 2d 185 (Cal. App. 2001)
	McCormick v GoForward Operating Limited Partnership, 235 Mich App 551, 556; 599 NW2d 513 (1999)
	McGoldrick v Holiday Amusements, 242 Mich App 286; 618 NW2d 98 (2000)
***************************************	Pauly v Hall, 124 Mich App 255, 262 (1983)
	<u>Putkamer v Transamerica Ins Corp.,</u> 454 Mich 626, 631; 563 NW2d 683 (1997)
SULLIVAN, WARD. ASHER & PATTON, P.C.	<u>Rizzo</u> v <u>Kretchmer</u> , 389 Mich 363 (1973)
	<u>Sanders</u> v <u>Delton Kellogg Schools</u> , 453 Mich 483, 487; 556 NW2d 467 (1996)
	<u>Schmitz</u> v <u>Cannonsburg</u> , 170 Mich App 692, 695-696; 428 NW2d 742 (1988)
	<u>Spreen</u> v <u>Smith</u> , 153 Mich App 1, 9 (1986)
JVAN, WA	Stenke v Masland Development Co Inc, 152 Mich App 562, 574 (1986)
=== SULI	<u>Terzano</u> v <u>Wayne County,</u> 216 Mich App 522, 526-527; 549 NW2d 606 (1996)
***************************************	Travis v Dreis and Krump Manufacturing Company, 453 Mich 149, 169; 551 NW2d 132 (1996)
***************************************	<u>Turner</u> v <u>Auto Club Ins Ass'n,</u> 448 Mich 22, 27; 528 NW2d 681 (1995)
	<u>United States</u> v <u>Khalife</u> , 106 F3d 1300, 1302 (6th Cir 1997)
	<u>Wills</u> v <u>Farm Insurance Company</u> , 437 Mich 205, 213; 468 NW2d 511 (1991) [Cavanagh, C.J.]

# **STATUTES:**

== SULLIVAN, WARD, ASHER & PATTON, P.C. ==

MCL 408.322					
MCL 408.322(g)					
MCL 408.326(a)					
MCL 408.326(a), (c) and (e)					
MCL 408.326(d)					
MCL 408.326a(c) and (e)					
MCL 408.326a(d)5					
MCL 408.341(1)					
MCL 408.342					
MCL 408.342(2)					
MCL 408.344					
P.A. 1962, No. 199, preamble					
OTHER AUTHORITIES					
1996-1997 Facts and Figures on the On-Snow Industry, Snowsports Industries America, 1998, p 13					
BCC Research & Consulting, The American Ski Industry – Alive, Well and Even Growing, p 2 (2003)					
Egan, Kari; What is Snowboarding? Top Ten Facts You Should Know, Primedia 2004 18					
Senate Legislative Analysis, SB 49, April 17, 1981					
Shealy, et al., <b>Epidemiology of Snowboarding Injuries: 1988-1995</b> , <i>Skiing Trauma and Safety:</i> 11th Volume, ASTM STP 1289, pp 49-59					
Transworld Snowboard Business/National Ski Area Association 1996-1997 Ski Resort Snowboarding Survey, p 1					

# **RULES**

MCR 2.116(C)(10)	 7, 8	
MCR 2.116(C)(7)	 7	,
MCR 2.116(C)(8)	 3	,
MCR 7.302(F)	 iv, 3	,
MCR 7 302(G)(1)	5	

# SULLIVAN, WARD, ASHER & PATTON, P.C.

# STATEMENT OF ORDER APPEALED FROM AND OF NEED FOR APPELLATE REVIEW PRIOR TO ENTRY OF FINAL JUDGMENT

This is an action filed under Michigan's Ski Area Safety Act arising out of Plaintiff's fall over a snowboard rail while he was engaged in alpine skiing. This Application represents the third time this action has been brought before the Michigan Supreme Court. The appeals have all been necessitated by the lower courts' continued misapplication of the controlling standards in barring application of the "assumption of the risk" defense set forth in Michigan's Ski Area Safety Act.

Initially, the Michigan Supreme Court directed the Michigan Court of Appeals to consider Defendant's appeal as if on leave granted from the denial of its Motion for Summary Disposition, pursuant to MCR 7.302(F). (EXHIBIT J).

On first remand, the Michigan Court of Appeals issued a written opinion on January 11, 2002, which affirmed the denial of Defendant's Motion for Summary Disposition under the "assumption of the risk" provision of the Ski Area Safety Act ("the Act"), MCL 408.342(2), infra.

More specifically, the Court of Appeals held that the snowboard rail did not present a risk that was encompassed under the "assumption of the risk" provision because it was not an "inherent" element of the sport of snowboard skiing and was not an "obvious and necessary" danger because it was not "open and obvious" under common law standards. (See: Michigan Court of Appeals' Opinion, 1/11/02, attached hereto as EXHIBIT I).

The Court of Appeals also initially held that, at the time of the incident, Defendant owed a general "duty to act for the safety of the public using its facilities" which served as an exception to the statutory immunity.

= SULLIVAN, WARD, ASHER & PATTON, P.C. :

On second remand from the Supreme Court, the Court of Appeals reconsidered the appeal in light of Anderson v Pine Knob, 469 Mich 20; 664 NW2d 756 (2003) In a 2 to 1 decision, the Court of Appeals here held that the snowboard rail was not an inherent element of the form of skiing engaged in by Plaintiff, alpine skiing, notwithstanding that Plaintiff was knowingly skiing on a snowboard terrain park at the time of his injuries. (Court of Appeals' Opinion, 6/3/04, attached as EXHIBIT K).

The issues raised in this Application are significant to the jurisprudence of this state. Commonly, alpine trails are contiguous to snowboard terrain parks in ski resorts. Yet, this action presents the Michigan Supreme Court with an issue of first impression regarding whether an alpine skier assumes the risk of inherent dangers of snowboard skiing while knowingly (or even unwittingly) skiing in a snowboard terrain park. In this regard, the Court of Appeals majority committed clear, palpable error in applying Anderson by holding that a skier only assumes the risks of the specific form of skiing (e.g. alpine) in which he or she is engaged even if on a terrain or course designed for another (e.g. snowboard).

Additionally, neither this Court nor the Michigan Court of Appeals has issued a published opinion regarding the impact of the amendment to the Act which included snowboarders within the definition of skiers and which further addresses the extent to which a risk may be deemed as "necessary and obvious" or an "inherent" part of the sport of snowboard skiing particularly where, more commonly, alpine slopes and snowboard terrains are now situated immediately adjacent to the other in ski parks and it is now more common to encounter skiers engaged in each form of the sport on the same hill. Guidance from the Michigan

= SULLIVAN, WARD, ASHER & PATTON, P.C.

Supreme Court would assist the trial bench and bar in future actions against ski course operators arising out of the interrelationship between snowboarders and alpine skiers.

Due to the errors and for the reasons otherwise more fully elaborated upon in this Application, Defendant requests an order either peremptorily reversing the Court of Appeals' written Opinion of June 3, 2004, or granting leave to appeal therefrom.

# STATEMENT OF ISSUE PRESENTED

AS A MATTER OF LAW, IS A SNOWBOARD RAIL UTILIZED BY SNOWBOARD SKIERS TO PERFORM ACROBATIC MANEUVERS AN INHERENT, NECESSARY AND OBVIOUS DANGER OF THE SPORT OF SKIING ASSUMED BY ALL SKIERS UPON A SNOWBOARD COURSE UNDER §22(2) OF THE SKI AREA SAFETY ACT?

Defendant-Appellant says "Yes."

Plaintiff-Appellee says "No."

The trial court and Court of Appeals said "No."

### **STATEMENT OF FACTS**

### Factual Background

This is a personal injury action which arises out of an incident at the Mt. Brighton ski area on February 5, 1997. On that date, the Plaintiff, Matthew Barrett, broke his leg while he was alpine skiing when he knowingly crossed over into a snowboard course and collided with a "rail," a terrain feature used by snowboarders for acrobatic maneuvers.

The rail is about 6 inches wide, 20 feet long, bright yellow in color, and ranges in height from several inches above the snow line to 12 to 14 inches above the snow line. [EXHIBIT A, "Investigation of the Matthew Barrett Accident," report by Plaintiff's expert; *see* EXHIBIT B, photographs of ski area (small photos taken Feb 6, 1997)]. The rail is used principally by snowboarders for acrobatic maneuvers, much as skateboarders would use rails and curbs for sliding jumps. [EXHIBIT C, at 4-5]. As may be viewed on the attached photograph, the rail runs downhill. [EXHIBIT B, photographs]. Snowboarders would ride the rail down its length and then jump off at the end. [EXHIBIT D, Bruhn deposition at 14].

The rail is adjacent to a snowboarding feature known as a "half-pipe," which is an indention in the snow similar to a ditch. [EXHIBIT D at 7, 14; EXHIBIT B, photographs]. The rail was installed in 1994, and there were no other accidents involving the rail, according to Mt. Brighton's general manager. [EXHIBIT D, at 12, 33].

The Plaintiff testified that he had skied at Mt. Brighton six to twelve times per year for four or five years prior to the accident, and had last skied at Mt. Brighton in January of 1997. [EXHIBIT E, Deposition of Matthew Barrett, pp 35-37]. In fact, he had never skied at any other location. On the day of the accident, at approximately 7:00 p.m., the Plaintiff arrived at Mt. Brighton and began to ski immediately. [Id. at 42, 44]. Visibility was clear. [Id. at 43].

The lights were apparently working and the Plaintiff had no difficulty seeing the slope. [See, id. at 51-52]. The Plaintiff made several runs down several areas of the hill prior to his collision with the rail at approximately 8:00 p.m. [Id. at 44-48]. He knew where the snowboard course was located [Id. at 54].

On the run downhill during which he was injured, Plaintiff and his skiing companion did not ski straight down the hill, but rather went across the hill at a diagonal, crossing between the second and third lift towers located between the Black triple chair and the snowboarding area. [Id. at 57-58; see also EXHIBIT F, diagram of ski area]. Significantly, Plaintiff intentionally skied into the snowboard park [Id. at 54]. He knew the snowboard park was there because he skied there earlier that evening and earlier that season [Id.]

Plaintiff stated that he skied over a rise in the snowboard area and then struck the rail, causing the injury to his leg. [EXHIBIT E, at 61-62]. Plaintiff stated that **he saw the rail;** "A second before I hit it." [Id. at 66].

The Plaintiff approached the rail from the right. This area was described as relatively flat for approximately 80 feet. [EXHIBIT D, at 33, 34]. The area is lit by Halogen lights attached to the snowmaking gun visible in the large photograph. [See EXHIBIT B, photographs, and EXHIBIT D, at 36]

Mt. Brighton personnel promptly responded to the accident and assisted the Plaintiff.

### **Lower Court Proceedings**

Plaintiff initiated this action on or about November 3, 1997, arguing that Defendant negligently maintained the premises by failing to post warnings of the existence of the snowboard rail, and in maintaining the rail and surrounding area. (See: Complaint, 11/3/97, ¶ 6, attached hereto as EXHIBIT H).

Defendant brought its Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10) on the grounds that Plaintiff assumed the risks presented by the snowboard rail as a matter of law [pursuant to the Ski Area Safety Act]. At a hearing held August 31, 1998, the trial court denied the motion on the basis that genuine issues of material fact existed regarding the existence of a duty to warn. [EXHIBIT C, at 32-33]. An order to that effect was entered September 11, 1998. [EXHIBIT G, Order].

## **Initial and First Remanded Appellate Proceedings**

From the September 11, 1998 summary disposition order, Defendant timely filed an Application for Leave to Appeal to the Court of Appeals, which was denied on November 18, 1998, for lack of a need for immediate appellate review. Timely Application for Leave to Appeal to the Supreme Court followed, and, on October 12, 1999, that Court remanded to this Court for consideration as on leave granted.

The Supreme Court order stated as follows:

On order of the Court, the application for leave to appeal from the November 18, 1998 decision of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals shall consider whether defendant owed plaintiff a duty under the Ski Area Safety Act, MCL 408.321 et seq.; MSA 18.483(1) et seq., to warn skiers of the presence of a snowboarding rail. In deciding this issue, the Court of Appeals shall also consider whether a snowboarding rail is an inherent part of a ski area and whether plaintiff assumed the risk of its presence.

[EXHIBIT J, Supreme Court order, 10/12/99].

On initial remand, the Michigan Court of Appeals issued its written opinion on January 11, 2002, affirming the denial of Defendant's Motion for Summary Disposition. (EXHIBIT I).

Initially, the Court of Appeals held that the snowboard rail did not present a risk that was encompassed under the "assumption of the risk" provision of the Ski Area Safety Act because it was not an "inherent" element of the sport of snowboard skiing (e.g., it was not an "obvious and necessary" danger of the sport) [Id. at 2-3].

The Court of Appeals also held that whether the danger was "obvious" depended upon whether the rail itself was "open and obvious" (under the standards utilized in applying the "open and obvious danger" doctrine) and, in this action, was a jury question [Id. at 3]. The Court of Appeals likewise held that, while on the date of the incident, Defendant did not owe Plaintiff duties to warn of the presence of the snowboard rail or to mark the entrances to the snowboard parks, it nonetheless owed a general "duty to act for the safety of the public using its facilities" which also required a denial of Defendant's Motion for Summary Disposition [Id)].

The Court of Appeals finally held that the rail did not constitute a "natural" alteration of the slope's terrain, the risk of which was assumed by skiers as a matter of law [Id].

# Additional Supreme Court and Second Remanded Court of Appeals Proceedings

From the January 11, 2002 Opinion, Defendant filed an Application for Leave to Appeal with the Michigan Supreme Court.

On or about October 30, 2002, the Michigan Supreme Court entered an order staying consideration of Defendant's Application for Leave to Appeal pending its decision in the action

of <u>Anderson</u> v <u>Pine Knob</u>, <u>supra</u>. The Supreme Court issued its opinion in <u>Anderson</u> on July 16, 2003.

Thereafter, On October 8, 2003, the Supreme Court noted the following errors in the January 11, 2002 Court of Appeals written opinion and entered the following Order in this action:

By order of October 30, 2002, the application for leave to appeal was held in abeyance pending the decision in Anderson v Pine Knob (Docket No. 121587). On order of the Court, the opinion having been issued on July 16, 2003, 469 Mich 20 (2003), the application is again considered, and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of Anderson. We note that the Court of Appeals erroneously imposed upon defendant a "duty to act for the safety of the public," which has no basis in the Ski Area Safety Act; additionally, the panel applied an "open and obvious" standard rather than the applicable "obvious and necessary" standard under MCL 408.342(2). The panel on remand is directed to apply the correct statutory standards. In so doing, the Court of Appeals should also discuss the application, if any, of MCL 408.326a(d) and MCL 408.344 to the facts of this case.

Order, 10/8/03 (attached hereto as EXHIBIT L).

On second remand, the Court of Appeals issued its Opinion on Reconsideration on June 3, 2004 (see: EXHIBIT K). Here, the Court of Appeals, purportedly applying the guidelines set forth in Anderson, supra, again held that the snowboard rail was not an "inherent" risk of the sport engaged in by the Plaintiff – alpine skiing. The Court of Appeals' Majority Opinion held that its focus must be upon risks inherent in the type of skiing engaged in by the Plaintiff, notwithstanding that the Plaintiff – while engaged in alpine skiing – purposely skied into a snowboard park [Id. at 3-4].

: SULLIVAN, WARD, ASHER & PATTON, P.C. ==

The majority also held that Defendant violated MCL 408.326a(c) and (e) by failing to post adequate signs indicating that the snowboard rail was designed only for snowboard skiers.

[Id. at 4-5].

Michigan Court of Appeals Judge Brian Zahra dissented, concluding that the majority erroneously held that the Plaintiff assumed only those risks inherent in alpine skiing, notwithstanding that he had knowingly crossed into a snowboard park and that a snowboard rail is inherent in the sport of skiing -- which necessarily encompasses snowboard skiing. [Id., J. Zahra dissenting, p. 1].

Judge Zahra also disagreed with the majority's conclusion that Defendant violated MCL 408.326a, because that statute contains no requirements for ski resort operators to post signs indicating that certain ski runs or trails are only designed for certain types of skiers, such as snowboarders. Judge Zahra also concluded that MCL 408.326a only required warnings of the appropriate degrees of difficulty of each run, and that there was no record evidence here to support that Plaintiff would have stayed away from the snowboard run had he knew of its assigned degree of difficulty [Id. at 2].

From the June 3, 2004 written Opinion, Defendant again seeks either peremptory reversal or leave to appeal.

# SULLIVAN, WARD, ASHER & PATTON, P.C.

### ARGUMENT I

AS A MATTER OF LAW, A SNOWBOARD RAIL UTILIZED BY SNOWBOARD SKIERS TO PERFORM ACROBATIC MANEUVERS IS AN INHERENT, NECESSARY AND OBVIOUS DANGER OF THE SPORT ASSUMED BY ALL SKIERS UTILIZING SNOWBOARD TERRAINS UNDER § 22(2) OF THE SKI AREA SAFETY ACT.

### A. Standard of Review

The underlying motion was filed pursuant to MCR 2.116(C)(7) and (C)(10). MCR 2.116, which provides for summary disposition, provides in pertinent part as follows:

- (C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
  - (7) The claim is barred because of release, payment, prior judgment, **immunity granted by law**, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.
  - (10) Except as to the amount of the damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

Summary disposition pursuant to MCR 2.116(C)(7) should be granted where a claim is barred by immunity granted by law. Under MCR 2.116(C)(7), any supporting evidence, including affidavits, depositions, and admissions, may be considered under a summary judgment motion. Maiden v Rozwood, 461 Mich 109 (1999).

Summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for plaintiff's claim. Dzierwa v Michigan Oil Co, 152 Mich App 281 (1986). Summary disposition is properly granted where there is no genuine issue of material fact and thus, the movant is entitled to judgment as a matter of law. Goldman v Lubella Extendables, 91

= SULLIVAN, WARD, ASHER & PATTON, P.C. =

Mich App 212 (1979), lv den 407 Mich 901 (1979); <u>Andrews</u> v <u>Hastings Mutual Ins Co.</u> 40 Mich App 664 (1970).

When summary disposition is claimed for lack of factual merit, a trial can be avoided if the record presented at the hearing shows that: (1) all facts essential to the rendition of the judgment on the claim or defense are not disputed by the parties; or (2) an essential element of proof of the claim or defense cannot be supplied. Continental Casualty Co v Enco Associates, Inc. 66 Mich App 46; Rizzo v Kretchmer. 389 Mich 363 (1973). For example, summary disposition should be granted notwithstanding the existence of disputes where, because of controlling propositions of law, resolution of all issues in favor of the party who opposes the motion would not preclude judgment for the moving party. General Motors Corp. v City of Detroit, 372 Mich 234, (1964), cert den 377 US 977; 12 L Ed 2d 746. Moreover, where facts are either admitted or undisputed, the trial court can properly apply the law to these facts and grant summary relief where appropriate. Duncan v Michigan Mutual Liability Co, 67 Mich App 386 (1976).

The party opposing a motion for summary disposition must come forward to establish the existence of a material factual dispute. If the non-moving party fails to establish that a material fact is in dispute, the motion is properly granted. Spreen v Smith, 153 Mich App 1, 9 (1986); Stenke v Masland Development Co Inc, 152 Mich App 562, 574 (1986).

A party opposing summary disposition based on MCR 2.116(C)(10) must propound admissible evidence to establish the existence of a disputed material fact. Pauly v Hall, 124 Mich App 255, 262 (1983); Goldman, supra at 217. Opinion evidence, denials, unsworn averments and inadmissible hearsay do not satisfy the non-movant's burden of production. Pauly, supra.

# == SULLIVAN, WARD, ASHER & PATTON, P.C. =

### B. <u>Controlling Principles of Statutory Construction.</u>

The cardinal rule of statutory interpretation is to give effect to the intent of the Legislature. Turner v Auto Club Ins Ass'n, 448 Mich 22, 27; 528 NW2d 681 (1995). However, it is well-settled that a clear and unambiguous statute leaves no room for judicial construction or interpretation. Coleman v Gurwin, 443 Mich 59, 65; 503 NW2d 435 (1993). Statutory language should be construed reasonably while considering the purpose of the statute. Barr v Mt Brighton, Inc, 215 Mich App 512, 516; 546 NW2d 273 (1995).

In resolving a disputed interpretation of statutory language, it is the function of the reviewing court to effectuate the legislative intent. If the language used is clear, the Legislature must have intended the meaning it plainly expressed and the statute must be enforced and applied as written. Anderson, supra; Sanders v Delton Kellogg Schools, 453 Mich 483, 487; 556 NW2d 467 (1996). When a statute fails to define an operative term, the Court may define the term in accordance with the Legislature's intent. Travis v Dreis and Krump Manufacturing Company, 453 Mich 149, 169; 551 NW2d 132 (1996). The primary and fundamental purpose of any rule of statutory construction is to assist the Court in discovering and giving effect to the intent of the Legislature. Terzano v Wayne County, 216 Mich App 522, 526-527; 549 NW2d 606 (1996).

To ascertain the reasons for a statute and the meaning of its provisions, reviewing courts may look for guidance to the legislative history. <u>United States</u> v <u>Khalife</u>, 106 F3d 1300, 1302 (6th Cir 1997). The preamble of a statute may also be useful for interpreting the statute's purpose and scope. <u>Malcolm</u> v <u>City of East Detroit</u>, 437 Mich 132, 143; 468 NW2d 479 (1991).

Statutory interpretation is a question of law for the Court to determine. Anderson, supra, Putkamer v Transamerica Ins Corp., 454 Mich 626, 631; 563 NW2d 683 (1997), Cardinal Mooney High School v Michigan High School Athletic Assoc., 437 Mich 75, 80; 467 NW2d 21 (1991). Likewise, where the facts are undisputed, application of a statute to the facts is an issue of law for the Court. Wills v Farm Insurance Company, 437 Mich 205, 213; 468 NW2d 511 (1991) [Cavanagh, C.J.], Marcelle v Taubman, 224 Mich App 215, 217; 568 NW2d 393 (1997).

## C. <u>Introduction to the Ski Area Safety Act.</u>

The Ski Area Safety Act ("the Act") was originally enacted in 1962. The purpose of the Act is stated in its preamble as follows:

AN ACT to provide for the inspection, licensing, and regulation of ski areas and ski lifts; to provide for the safety of skiers, spectators and the public using ski areas; to provide for certain presumptions relative to liability for an injury or damage sustained by skiers; to prescribe the duties of skiers and ski area operators; to create a ski area safety board in the office of the Director of Licensing and Regulations; ...

Preamble to P.A. 1962, No. 199.

The primary goal of the Legislature in enacting the Act was to both promote skiing safety and make the skier, rather than the ski area operator, bear the burden of damages from injuries sustained due to inherent risks of the sport. Anderson, supra, 469 Mich at 25; Kent v Alpine Valley, 240 Mich App 731, 737-738; 613 NW2d 383 (2000); Schmitz v Cannonsburg, 170 Mich App 692, 695-696; 428 NW2d 742 (1988). Thus, in 1981, the Legislature added Section 22 to the Act, as follows:

Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not : SULLIVAN, WARD, ASHER & PATTON, P.C. =

limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow making or snow grooming equipment.

MCL 408.342(2) [emphasis added].

According to "the plain and unambiguous wording of § 22(2)... the Legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators." Schmitz, supra, 170 Mich App at 695. In this regard, the Supreme Court in Anderson held that the list of risks assumed by an individual participating in the sport of skiing is not exclusive and extends to any risk that is "obvious and necessary" to the sport. 469 Mich at \_\_\_\_. Section 22(2) constitutes "an assumption of the risk clause" with respect to those dangers. [Id.]

In Schmitz, supra, the Court of Appeals described the statute as follows:

Therefore, it is logical to construe this section of the statute as an assumption of the risk clause that renders the reasonableness of the skiers' or the ski area operator's behavior irrelevant. By the mere act of skiing, the skier accepts the risk that he may be injured in a manner described by the statute. The skier must accept these dangers as a matter of law.

170 Mich App at 695.

Significantly, the Act does not condition application of § 22(2)'s "assumption of risk" provision on compliance with outside safety standards. McCormick v GoForward Operating Limited Partnership, 235 Mich App 551, 556; 599 NW2d 513 (1999). Thus, by the mere act of skiing, a participant accepts the risk that he or she may be injured in a manner described by the Act and is barred from recovering against the ski area operator. Anderson, supra; Schmitz, supra; Barr v Mt Brighton, Inc, 215 Mich App 512, 519; 546 NW2d 273 (1996).

The Senate Legislative Analysis of Section 22(2) explains the legislative intent, rationale and purposes underlying the provision:

By clearly defining the extent to which skiers and ski area operators are liable for damages and injuries sustained in skiing accidents, the bill would help reduce the number of lawsuits in which skiers recover large sums of money for injuries that are primarily their own fault. This, in turn, should stabilize the constantly increasing insurance cost for ski area operators, which have been passed onto skiing enthusiasts through price hikes for ski lift tickets, rental equipment, waxing, services, etc.

Senate Legislative Analysis, SB 49, April 17, 1981. See also 170 Mich App at 695.

The same analysis elaborated with the following history:

In recent years liability insurance costs to ski area operators have been rising rapidly. The skiing industry claim that in some states, high insurance costs or an inability to obtain any insurance at any price are causing ski areas to shut down for good. There have been instances of skiers in other states who have been injured while taking unnecessary risks beyond the limits of their abilities, yet who have won suits for damages against the operators of the ski areas where they were injured.... This caused some insurance companies to cancel their policies with the ski area operators, and in most instances sent insurance rates on a rapid rise across the nation. At the same time, some ski area operators have been accused of causing dangerous situations by operating snow grooming equipment on slopes too near to skiers, improperly identifying hazards on a ski slope, or operating ski lift equipment under unsafe conditions. Some people feel because of these problems, the responsibilities of both skiers and ski area operators need to be clearly defined in statute.

Id.

In <u>Grieb</u> v <u>Alpine Valley Ski Area, Inc</u>, 155 Mich App 484; 400 NW2d 653 (1986), the Michigan Court of Appeals reemphasized the legislative intent underlying the "assumption of the risk" provision of Section 22(2):

We have extensively reviewed the legislative history of the Act, in particular the 1981 amendment presently in question. The Legislature perceived a problem with respect to the inherent dangers of skiing and the need for promoting safety, coupled with the uncertain and potentially enormous ski area operator's liability. Given these competing interests, the Legislature

== SULLIVAN, WARD, ASHER & PATTON, P.C.

decided to establish rules in order to regulate the ski operators and to set out the ski operators' and skiers' responsibilities in the area of safety.... As part of this reform, the Legislature has decided that all skiers assume the obvious and necessary dangers of skiing. This is a rational solution for limiting ski operator's liability and promoting safety.

155 Mich App at 588-489.

Section 22(2) serves to bar applicable claims by "each person who participates in the sport of skiing." Moreover, the Act contains separate provisions addressing the duties of "a skier." For example, Section 21 of the Act provides in relevant part:

A skier shall conduct himself or herself within the limits of his or her individual ability and shall not act or ski in a manner that may contribute to his or her injury or to the injury of any other person. A skier shall be the sole judge of his or her ability to negotiate a track, trail, or slope.

MCL 408.341(1).

From the time of the statute's original enactment until 1995, the Act defined the term "skier" as "a person wearing skis, or a person not wearing skis while the person is in a ski area for the purpose of skiing". MCL 408.322(g); MSA 18.483(2)(g). This definition, however, was amended in 1995 to clarify that it encompassed one engaged in snowboard skiing, which is part of "the sport of skiing":

'Skier' means a person wearing skis or utilizing a device that attaches to at least one foot or the lower torso for the purpose of sliding on a slope. The device slides on the snow or other surface of a slope and is capable of being maneuvered and controlled by the person using the device. Skier includes a person not wearing skis or a skiing device while the person is in a ski area for the purpose of skiing.

MCL 408.322; MSA 18.483(2).

Michigan appellate courts interpreting Michigan law have routinely barred negligence actions filed by injured skiers consistent with the dictates of MCL 408.342(2). These claims --

whether founded on theories of negligent misfeasance, failure to warn or otherwise -- have been barred as a matter of law whether the alleged cause of injury is human error, a natural terrain feature, or a manmade object. See, e.g., <u>Anderson, supra, [Placement of timing shack]</u>, <u>Grieb, supra [barring claim for injury after plaintiff was struck by an unknown skier], Schmitz, supra, [barring claim after plaintiff's decedent collided with a tree on the ski slope], <u>Kent v Alpine Valley, supra, [plaintiff tangled in operating ski lift]. McCormick v Go Forward, supra.</u> [collision with skier in front of chair lift], <u>McGoldrick v Holiday Amusements</u>, 242 Mich App 286; 618 NW2d 98 (2000) [collision with ski lift tension pole].</u>

## D. Anderson v Pine Knob

In <u>Anderson</u>, Plaintiff filed suit for injuries sustained following his collision with a timing shack housing timing equipment situated at the bottom of a ski run. Plaintiff was, at the time, engaged in a high school slalom competition. The Michigan Supreme Court held that the danger presented by the timing shack was an inherent, necessary and obvious risk of the sport of skiing, thereby precluding recovery for injuries resulting from its presence. 469 Mich at 25-26.

The <u>Anderson</u> Court first observed that the examples of risks designated by the Ski Area Safety Act's "assumption of the risk" provision, MCL 408.342, <u>supra</u>, constituted a nonexclusive list of risks encompassed by the provision because they all "inhere in the sport of skiing" and are obvious and necessary to the sport. 469 Mich at 24-25. The Supreme Court recognized that other risks not specifically identified in the statute are nonetheless encompassed

by the statute so long as those risks likewise inhere in the sport and are obvious and necessary to the sport. [Id.]<sup>1</sup>

Anderson next concluded that the timing shack was a necessary and inherent element to the sport of skiing even if it was placed in a dangerous location at the bottom of the run:

There is no disputed issue of fact in this matter that in ski racing, timing, as it determines who is the winner, is necessary. Moreover, there is no dispute that for the timing equipment to function, it is necessary that it be protected from the elements. This protection was afforded by the shack that all also agree was obvious in its placement at the end of the run. We have then a hazard of the same sort as the ski towers and snow-making and grooming machines to which the statute refers us. As with the towers and equipment, this hazard inheres in the sport of skiing. The placement of the timing shack is thus a danger that skiers such as Anderson are held to have accepted as a matter of law.

[Id. at 25-26].

The Supreme Court in <u>Anderson</u> then concluded that while the parties before it stipulated that the shack was visibly obvious, the elements of the common law "open and obvious danger" doctrine were not material and inapplicable to the statutory "assumption of the risk" defense. The majority opinion characterized dissenting Justice Weaver's advocation of the application of the "open and obvious" common law elements as "off target because the common law no longer controls once the Legislature enacts statutes that preempt it." 429 Mich at 27, fn 2.

In a similar vein, <u>Anderson</u> rejected the argument that decisions regarding the reasonableness of the placement and maintenance of manmade hazards are relevant to the application of the statutory defense. The majority opinion reasoned as follows:

<sup>&</sup>lt;sup>1</sup> Anderson held that whether a risk falls within MCL 408.342 is an issue of law.

=== SULLIVAN, WARD, ASHFR & PATTON, P.C. =

To adopt the standard plaintiff urges would deprive the statute of the certainty the Legislature wished to create concerning liability risks. Under plaintiff's standard, after any accident, rather than immunity should suit be brought, the ski-area operator would be engaged in the same inquiry that would have been undertaken if there had been no statute ever enacted. This would mean that, in a given case, decisions regarding the reasonableness of the placement of lift towers or snow groomers, for example, would be placed before a jury or judicial fact-finder. Yet it is just this process that the grant of immunity was designed to obviate. In short, the Legislature has indicated that matters of this sort are to be removed from the common-law arena, and it simply falls to us to enforce the statute as written. This we have done.

[<u>Id.</u> at 26].

Anderson thus concluded that the risk of collision with the timing shack was accepted by Plaintiff even if the collision could have been avoided by placement of the shack in an alternate area. <u>Id</u>. As a result, the Supreme Court held that Plaintiff's claim was barred as a matter of law. <u>Id</u>.

## E. Background to Snowboard Skiing

Snowboard skiing has rapidly become a very popular sport at many ski areas throughout the United States. The sport combines the principles of surfing and skateboarding with the low friction surface of the alpine ski mountain to provide a new challenge to many of the participants who have already mastered alpine/downhill skiing. Weiss, C. **Snowboarding:**Know-how, Sterling Publishing Co., New York, 1993.

Snowboard skiing involves the use of a single snowboard containing nonreleasable bindings (e.g., bindings which do not release at an adjustable preset value). The snowboard skier's stance is asymmetric and turns are classified as "toe side" and "heel side" turns. Shealy, et al., **Epidemiology of Snowboarding Injuries:** 1988-1995, *Skiing Trauma and Safety:* 11th

SULLIVAN, WARD, ASHER & PATTON, P.C.

Volume, ASTM STP 1289, pp 49-59. Snowboard skiing takes place on the same slopes as alpine skiing. Snowboard courses are commonly adjacent to alpine trails.

The origin of snowboard skiing began in the early 1960s. By 1988, the sport had approximately 1,254,000 participants. That number grew to 1,455,000 participants in 1990 and to 2,254,000 participants in 1995. The number of participants skyrocketed to 3,711,000 in 1996 -- representing a 155% increase since 1990. 1996-1997 Facts and Figures on the On-Snow Industry, Snowsports Industries America, 1998, p 13. According to the NSAA's Kottke End of Season Survey Figures, snowboarding accounted for approximately 17.7% of total United States ski visits during the 1996-1997 season -- up more than 23% over 1995-1996 estimates. These figures represent a compounded four year annual growth rate of almost 20%. Transworld Snowboard Business/National Ski Area Association 1996-1997 Ski Resort Snowboarding Survey, p 1. In contrast, over the same four year period, total combined alpine and snowboard ski visits declined by an annual rate of 1.3% -- illustrating the dramatic increase in popularity of snowboard skiing when compared with the stagnation of alpine skiing over the same period. Id.

The growth of snowboard skiing has continued into the new decade. By 2000, "snowboarding was the fastest growing sport in the U.S. "... with the number of people who went snowboarding rising to a total of just over 7.2 million participants." *Egan, Kari*; **What is Snowboarding? Top Ten Facts You Should Know**, *Primedia 2004*. During the 2002-2003 season, "the ski industry witnessed its best season ever – 57.6 million (combined) skier/snowboarder visits." BCC Research & Consulting, **The American Ski Industry – Alive**, **Well and Even Growing**, p 2 (2003). Snowboarding made its Olympics debut in Japan in 1998.

= SULLIVAN, WARD, ASHER & PATTON, P.C.

Unfortunately, snowboard skiing, like alpine skiing, is not without its risks. The overall rate of injuries from snowboard skiing is comparable to downhill skiing, with snowboard skiing injury rates tending to be somewhat higher than downhill injury rates. *Shealy*, et al., **Epidemiology of Snowboarding Injuries**, supra. Because of the risks of the sport, snowboard skiers typically have a higher incidence of ankle and wrist injuries and a higher incidence of fractures. Alpine skiing has a higher incidence of knee and lower leg injuries. <u>Id.</u>

F. <u>An Alpine Skier Assumes All Risks Inherent in All Types of Skiing Present Upon the Course He or She is On.</u>

On second remand, the Court of Appeals construed Anderson, supra, as limiting the risks assumed by a skier to those that are involved in the specific type of skiing in which he or she is engaged – notwithstanding that the course may be designed for both alpine and snowboard activities and thus presents risks inherent in both forms of skiing. In this regard, the Court of Appeals' Majority Opinion erroneously held:

There are, of course, dangers that every type of skier is confronted with by the very nature of skiing and the environment in which the sport is situated. ... Certain dangers are just 'part and parcel' of the sport, no different than the expected danger of falling during the course of skiing. A downhill skier, however, should not be expected to encounter a snowboard rail during the course of downhill skiing.

EXHIBIT K, p 3.

The Court of Appeals' decision misconstrues <u>Anderson</u>, <u>supra</u>, and is contrary to the plain language of MCL 408.342(2). Contrary to the Court of Appeals' ruling, neither the statute nor <u>Anderson</u> limits those risks assumed by a skier to those inherent in the specific type of skiing engaged in by the skier.

The plain language of MCL 408.342(2) provides that "each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are SULLIVAN, WARD, ASHER & PATTON, P.C. =

obvious and necessary." Thus, each person who participates "in the sport of skiing" assumes those risks inherent in the "sport of skiing." The phrase "the sport of skiing" extends beyond merely traditional forms of alpine skiing, as is illustrated by the definition of "skier" contained in MCL 408.322(g). The broad statutory definition of "skier" now encompasses any individual "utilizing a device that attaches to at least one foot or the lower torso for the purpose of sliding on a slope" (e.g., alpine and snowboard skiers) and even those individuals "not wearing skis or a skiing device while the person is in a ski area for the purpose of skiing." MCL 408.322(g).

Consequently, the plain language of the controlling statutes dictates an expansive reach of those risks assumed by skiers to encompass all risks inherent "in the sport of skiing" as a whole. By necessity, this includes not only those risks inherent in the form of skiing engaged in by the "skier," but also to those risks inherent in any other form of skiing which may present themselves to the "skier."

Likewise, <u>Anderson</u> cannot be interpreted as mandating a limitation of risks assumed by a "skier" to those inherent in the type of skiing engaged in by that "skier." As Judge Zahra's dissenting opinion below observed:

The [Anderson] Court did not differentiate between different types of skiing or conclude that, because a timing shack is only necessary for ski racing, only ski racers accept the danger of collision with such a shack. Rather, the Court held that a timing shack is a danger that any skier – whether a cross-country skier, a snowboarder, or a ski racer – is held to have accepted as a matter of law.

(EXHIBIT K, J. Zahra dissenting, p. 1).

Indeed, as Judge Zahra properly recognized, the Supreme Court in <u>Anderson</u> held that a skier – whether alpine, snowboarder or otherwise – accepts as a matter of law any hazard that "inheres the sport of skiing" in its entirety. 469 Mich at 26. ["As with the

...... SULLIVAN, WARD, ASHER & PATTON, P.C. .....

towers and equipment, this hazard inheres in the sport of skiing. The placement of the timing shack is thus a danger that skiers such as Anderson are held to have accepted as a matter of law." Id]. Anderson did not state or even imply that skiers only accept the dangers inherent in their particular form of skiing. Rather, the alpine ski racer in Anderson accepted the risk of the presence of the timing shack because that was a risk "inherent in the sport of skiing as a whole." (Id)!

Nor do the policies and legislative intent underlying the enactment of MCL 408.342(2) support the Court of Appeals' interpretation and application of the statute.

As previously explained, the "assumption of risk" statutory defense was enacted to limit the exposure of ski area operators for damages and injuries sustained in skiing accidents involving risks that are inherent in the sport as a whole. As the sport of snowboard skiing has skyrocketed in popularity in recent years, snowboard courses have been developed immediately adjacent to alpine runs, and it has become commonplace to see both alpine and snowboard skiers on the same course. As a direct consequence thereof, lawsuits involving collisions between alpine and snowboard skiers are also becoming more commonplace. See, e.g. Mastro v Petrick, 112 Cal. Rptr. 2d 185 (Cal. App. 2001). In such situations, the collision between snowboard and alpine skiers are deemed an inherent risk in the sport of skiing in its entirety as a matter of law. Id., 112 Cal. Rptr. 2d at 190.

MCL 408.342 must thus be interpreted consistent with its plain terms to protect ski area operators against liability from risks inherent in the sport of skiing in its entirety when more than one type of skiing may take place upon a single terrain or course. This protection is primarily necessary with regard to claims by experienced alpine skiers who knowingly and purposely ski into a snowboard course – such as the Plaintiff here. As a matter of

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law, those skiers assume risks inherent not only in alpine skiing, but in snowboard skiing as well. Those risks inhere in the sport of skiing in its entirety.

For these reasons, the Michigan Court of Appeals erroneously interpreted and applied the statutory "assumption of risk" defense as a matter of law by concluding that skiers assume only those risks inherent in the type of skiing in which they are engaged at the time of their injury. The skier instead assumes all risks inherent in every type of skiing activity that may be engaged in on that particular course.

# SULLIVAN, WARD, ASHER & PATTON, P.C.

### **ARGUMENT II**

# DEFENDANT DID NOT VIOLATE MCL 408.326(a) BY POSTING INADEQUATE WARNINGS OF THE DIFFICULTY OF SKI SLOPE ON WHICH PLAINTIFF WAS INJURED.

### A. Introduction to Argument

In its Remand Order of October 8, 2003, the Supreme Court directed the Court of Appeals to discuss the application of MCL 408.326(d) to this action. That section requires appropriate warnings of trails which are "closed to skiing." The Court of Appeals below correctly concluded that because the area in which Plaintiff encountered the snowboard rail was not "closed to skiing", Paragraph (d) was not violated.

However, the Court of Appeals majority went beyond the scope of the Supreme Court's remand order and held that Defendant violated MCL 408.326(a), (c) and (e) by failing to mark the top of each ski run with appropriate symbols and warnings regarding the relative difficulty of that run. The Court of Appeals also erroneously held, as a matter of law, that the run should have been designated as "most difficult" since regulations promulgated **subsequent** to this incident required such a designation. See: EXHIBIT K, p. 5, citing 1999 AACS, R. 408.81.

The error of the majority opinion was succinctly highlighted by Judge Zahra's dissent as follows:

There is nothing in the above quoted statutory provisions that requires defendant to post signs indicating that certain ski runs or trails are only meant for certain types of skiers, such as snowboarders. These statutory provisions only require that each ski run be marked with an appropriate symbol indicating its degree of difficulty and that a trail board display the network of ski runs and label them with their appropriate degree-of-difficulty symbol. There is no indication that this was not done in the present case.

Even assuming that defendant failed to provide the notice required under these statutory provisions, it is only liable 'for that == SULLIVAN, WARD, ASHER & PATTON, P.C. ==

portion of the loss or damage resulting from that violation.' Here, there is nothing to support the conclusion that defendant would have stayed off the snowboard run had he known its degree of difficulty. Plaintiff started at the top of the hill and began his descent down a ski run, but skied at an angle and purposely crossed over into the area that he knew was used for snowboards, where he hit the snowboard rail. Any lack of signage relating to the degree of difficulty of the snowboard run did not cause plaintiff's injury.

Consequently, the Court of Appeals went beyond the scope of the Supreme Court's Remand Order and erroneously held as a matter of law that: (1) Defendant violated MCL 408.326(a); and (2) such violation was a proximate cause of the Plaintiff's injuries. Given the Plaintiff's decision to cross over into the snowboard slope from the adjacent alpine slope, any alleged lack of signage relating to the difficulty of the snowboard run could not have caused his injuries as a matter of law.

# SULLIVAN, WARD, ASHER & PATTON, P.C.

Dated: July 15, 2004

W0356727/BOJ

### **CONCLUSION**

For the foregoing reasons, Defendant-Appellant Mt. Brighton, Inc. respectfully requests that this Honorable Court either peremptorily reverse or grant leave to appeal from the Michigan Court of Appeals' Majority Opinion of June 3, 2004.

Respectfully submitted,

SULLIVAN, WARD, BONE, TYLER & ASHER, P.C.

By:

RONALD S. LEDERMAN (P38199) SCOTT D. FERINGA (P28977)

Attorneys for Defendant-Appellant Mt. Brighton

1000 Maccabees Center

25800 Northwestern Highway

P. O. Box 222

Southfield, MI 48037-0222

(248) 746-0700